**PP**

**v.**

**NANDA KUMAR K KALIAPAN & ORS**

HIGH COURT MALAYA, IPOH
CHOONG SIEW KHIM JC
[CRIMINAL TRIAL NO: 45-22-2009 & 45B-1-2009]
20 MAY 2013

***CRIMINAL LAW:*** *Murder - Identification - Four accused charged with murdering cashier at petrol station - Robbery - Whether identification of accused persons positively consistent and unshaken - Reliance on CCTV recording - Two persons seen to proceed to payment counter while two others waited outside - Whether recording credible and corroborated witnesses' evidence - Whether there was evidence to link all accused persons to murder - Penal Code, s. 302*

***EVIDENCE:*** *Identification evidence - Accused, of - Whether prosecution witnesses' positive identification of accused persons at murder scene consistent and unshaken - Whether CCTV recording of incident corroborated witnesses' oral testimonies - Whether defence of grave and sudden provocation and sudden fight succeeded - Whether criminal knowledge or intention under s. 35 Penal Code inferable against accused*

The four accused in this matter were charged under s. 302 of the Penal Code, for the offence of murdering a cashier ('the deceased') at a petrol station early one morning. The prosecution's case was largely based on the evidence of the deceased's colleague, SP2, also a cashier at the station, and that of SP4, a pump attendant at the facility. Both SP2 and SP4 positively identified the first and fourth accused as participants in the crime. In addition, SP4 positively identified the third accused as the person who was waiting by the door of a red car in which all the accused had arrived at the station. SP2 testified that minutes after she had arrived for work, she was performing a transaction at the ATM machine when she heard the deceased shout. She turned to see the deceased fighting with the fourth accused at the payment counter and she also noticed the first accused armed with a *parang* coming towards her. SP2 ran out of the station towards another petrol station located nearby. SP4, meanwhile, said he saw three persons alighting from a red car parked near the station. They went into the station's shop while the third accused waited by the car. SP4 said a while later he heard a scream and saw

A SP2 running out. He went closer to see what was happening and saw the first accused holding a *parang* against the deceased while the fourth accused was taking money from the counter till. SP4 later saw three persons coming out of the shop, getting into the car and driving off. SP2 returned to the station minutes later to B find the deceased grievously injured. He succumbed to his injuries by the time the police and the ambulance arrived at the scene. The third accused was found by the police to be the owner of the red car whilst the second accused was arrested after police recovered a 21-inch *parang* from a mine near a house where he C stayed. The court also viewed a CCTV recording of the inside of the petrol station shop where the attack on the deceased took place.

D **Held (convicting first and fourth accused of murder and sentencing them to death and acquitting and discharging second and third accused):**

**(1)** The evidence of SP2 and SP4 was consistent and unshaken in the identification of the first accused as the one who was holding the *parang*, the fourth accused as the one who was E taking money at the counter and the third accused as the one who was standing by the side of the red car. Their evidence was not challenged directly in cross-examination to establish that their identification of the first, third and fourth accused was mistaken. The CCTV recording remained authentic and F gave a credible account of what happened in the counter area of the shop and corroborated the testimony of the witnesses. (para 27)

**(2)** The evidence available against the third accused could not G create the inference of knowledge or intention on his part in the commission of the murder in the context of s. 35 of the Penal Code. It was reasonable or likely probable that based on the facts against him, the third accused was merely waiting for the others by the side of the car and as such, the benefit H of the doubt ought to be given to him. SP4, after all, did not see the third accused outside the car all the time. The third accused could not be considered or assumed as having joined in the act as per the charge with such knowledge or intention as was required under s 35. Hence, a *prima facie* case had not I been proven against him. (para 37)

**(3)** There was want of *prima facie* evidence against the second accused because there was nothing to indisputably conclude that the *parang* recovered near his house was the murder weapon. There was no evidence to link and implicate the second accused to the charge against him. He was not identified by SP2 and SP4 as the third person who had entered the shop. (para 40)

**(4)** Based on the evidence, the inference was irresistible for the application of s 35 of the Penal Code against the first and fourth accused. Their defence was that there was provocation from the deceased and sudden fight which was not pre-meditated and resulted in the deceased's death. For that defence to succeed, they had to show the provocation was so grave and sudden that it deprived them of self-control. The story-line of the defence, however, simply did not smack of any viable defence of grave and sudden provocation. (paras 46, 58 & 60)

**(5)** The defence of sudden fight was baseless. The first and fourth accused claimed the deceased was lying below them during the struggle and that they together with the second accused were on top of each other on the body of the deceased who had fallen to the ground. That was a case of three against one and they plainly had undue or unfair advantage over the deceased and could have easily overpowered him. The suggestion that the accused were frightened when the deceased allegedly took out a *parang* when he was inside the counter was too feeble to accept as they, being outside the counter, could have immediately fled the place. That would have been the natural response or reflex action of any reasonable man put in a similar situation. (paras 63 & 64)

**(6)** The first and fourth accused failed to cast any reasonable doubt on the prosecution's case. The prosecution had proved its case against them beyond reasonable doubt. (para 67)

**Case(s) referred to:**
*Ahmad Raduan Awang Bol v. PP [2003] 1 CLJ 366 CA* ***(refd)***
*Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC* ***(refd)***
*Atma Singh Kahan Singh v. The State AIR 1955 Punjab 191* ***(refd)***
*Azhar Che Wil v. PP [2010] 8 CLJ 905 FC* ***(refd)***
*Balachandran v. PP [2005] 1 CLJ 85 FC* ***(refd)***
*Budhsen v. State of UP [1970] Cri LJ 1149* ***(refd)***
*DA Duncan v. PP [1980] 1 LNS 222 FC* ***(refd)***

A *Dorai Pandian Munian & Anor v. PP [2012] 10 CLJ 22 CA* ***(refd)***
*Erivesto Anderson & Anor v. PP [2008] 6 CLJ 453 FC* ***(refd)***
*Hainie Hamid v. PP [2003] 2 CLJ 137 CA* ***(refd)***
*Jaafar Ali v. PP [1999] 1 CLJ 410 HC* ***(refd)***
*Lim Tiong Seng & Satu Lagi lwn. PP [2011] 5 CLJ 1 CA* ***(refd)***
B *Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC* ***(refd)***
*Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA* ***(refd)***
*Malkansingh v. State of Madhya Pradash [2003] Cr LJ 3535* ***(refd)***
*Mohamed Kunjo v. PP [1977] 1 LNS 74 PC* ***(refd)***
*Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA* ***(refd)***
C *PP lwn. Mohan Dass Ganesan [2007] 8 CLJ 23 HC* ***(refd)***
*PP v. Awang Raduan Awang Bol [2005] 1 CLJ 649 FC* ***(refd)***
*PP v. Ku Lip See [1980] 1 LNS 166 HC* ***(refd)***
*PP v. Low Kian Boon & Ors [2006] 3 CLJ 649 HC* ***(refd)***
*PP v. Megat Shahrizat Megat Shahrur [2011] 5 CLJ 608 CA* ***(refd)***
D *R v. Turnbull & Others [1976] 3 All ER 549* ***(refd)***
*T Paramasparan Thanigajalam v. PP [2012] 4 CLJ 309 CA* ***(refd)***
*Tan Kim Hoo v. PP & Another Appeal [2007] 6 CLJ 557 CA* ***(refd)***
*Vaikuntam Chandrappa v. State of AP [1960] Cri LJ 1681* ***(refd)***
*Virsa Singh v. State of Punjab AIR 1958 SC 465* ***(refd)***

E **Legislation referred to:**
Criminal Procedure Code, s. 180(4)
Penal Code, ss. 35, 300(c), 302

Penal Code [India], s. 300(c)

F *For the prosecution - Azizah Ahmad; DPP*
*For the 1st & 4th accused - Rajit Gill; M/s Rajit Gill & Co*
*For the 2nd accused - Ranjit Singh; M/s Ranjit Singh Sandhu & Co*
*For the 3rd accused - Charan Singh; M/s Nurul & Charan*

*Reported by Ashok Kumar*

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## JUDGMENT

H **Choong Siew Khim JC:**

**[1]** The first to the fourth accused persons were charged for murdering Mohammad Khairuddin bin Mohamed Isa No. KP: 660506-08-5069 on 11 November 2008 about 6.58am at Stesyen
I Minyak Petronas, Gunong Lang, Jalan Kuala Kangsar, Ipoh, Perak Darul Ridzuan, an offence punishable under s. 302 of the Penal Code.

**[2]** The first to the third accused were charged in case 45-22-2009 while the accused in 45B-1-2009 was the fourth accused. The two cases were jointly tried. The onus was on the prosecution to prove a *prima facie* case before any of the accused could be called upon to enter his defence. Section 180(4) of the Criminal Procedure Code provides that a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

**[3]** What constitutes a *prima facie* case was spelt out in the oft-cited cases of *Balachandran v. PP* [2005] 1 CLJ 85 and *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734. In the former case, the test for a *prima facie* case was succinctly stated:

> The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

**[4]** In the second case, it was held in this manner:

> Under s. 180 of the Criminal Procedure Code (Revised 1999), the duty of a judge, sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a *prima facie* case against the accused. The judge has only one exercise to undertake; he must subject the evidence of the prosecution to a maximum evaluation and then ask himself this question: If I decide to call upon the accused to enter on his defence, and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution's case? If the answer is in the negative, then no *prima facie* case has been made out, and the accused is entitled to an acquittal. (Subjecting the prosecution's evidence to a maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond reasonable doubt at that intermediate stage).

## Facts Of The Prosecution Case

**[5]** On 11 November 2008 SP2 (Nor Azila bt Mohd Sofian), a cashier of the Petronas Petrol Station, Jalan Kuala Kangsar, Ipoh, Perak, reported for work at 6.55am. The deceased also worked as

A a cashier whose shift was from 11pm the previous night until 7am. The deceased was at the cashier counter when SP2 arrived. Two others, Azman (SP4, Azman bin Mohd Safari) and Pakcik Idris (not called as a witness) were at the petrol pumps. After keeping her bag at the cashier section and switching on her computer to B start her shift, she proceeded to an automated teller machine (ATM) which was located to the right of the cashier as she wanted to transfer money. While at the ATM, she heard the deceased shouting loudly and on turning her head to the back she saw the deceased fighting ("berlawan") with a male Indian at the C cashier section. Another male Indian meanwhile was coming towards her.

**[6]** SP2 described the male Indian at the counter as one wearing a cap, tall and thin. She identified the fourth accused as this man. D She said the one approaching her wore a sweater and was holding a parang in his hand towards her. She identified him as the first accused.

**[7]** Faced with this situation, she ran out from the station shop ("Kedai Mesra") towards the direction of the Mobil Petrol Station E (which was located nearby) followed by Pakcik Idris. She did not see where was Azman then. Ten minutes later, she returned to the Petronas Station. On entering the Kedai Mesra, she saw the deceased seated at a table on the left of the cashier area. He was bleeding on the face and crying "sakit, sakit". SP2 then F approached a male customer who had parked his car outside the Kedai Mesra to seek his help to call the police and ambulance. When the police and ambulance arrived, the deceased was already dead. SP2 identified the deceased in photographs P7(1-3) and photographs P8(1-50) as the scene of incident.

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**[8]** Azman (SP4) worked as a pump attendant at the said Petronas Petrol Station on 11 November 2008. His working hours were from 7am till 3pm. He arrived for work at 6.45am on that fateful day. At about 7am SP4 was at pump no. 10. He saw a H red Proton Saga Aeroback stopping at pump 7. Pumps 10 and 7 were about five feet apart. One male Indian alighted from the car to pay for petrol refilling at the counter. The person who topped up was different from the one who paid for the refilling. After filling up, the car was parked by the road-side near the drain.

I

**[9]** After the car (the registration number of which SP4 could not recall at the time of the trial) was parked there, three male Indians went inside the shop as if to purchase things. SP4 continued with his chores at pump 10. Shortly he heard someone screaming. He saw SP2 running out and going towards the Mobil Station. Pakcik Idris also followed suit. SP4 then saw people ("orang") quarrelling ("bergaduh") at the cashier counter. He proceeded forward intending to stop the quarrel. He stopped at point "H" which he marked in photograph P8(5). He instead saw a male Indian wearing a dark coloured shirt holding a parang towards the direction of the deceased. On seeing this, SP4 retreated to pump 10 in shock. He said the parang was a long one. He identified the male Indian holding a parang as the first accused.

**[10]** SP4 saw another male Indian (whom he identified as the third accused) standing by the driver's door of the red Proton Saga. This male Indian did not enter the Kedai Mesra. SP4 then tried but failed to stop a lorry at the main road. He went back to pump 10 and from there, he saw a male Indian wearing a cap taking money from the counter. He saw the face of this male Indian whom he identified as the fourth accused.

**[11]** Subsequently, SP4 saw the three male Indians coming out from the same door through which they had entered the shop earlier. They left in the red Proton Saga which was parked by the side of the drain. The car proceeded towards the direction of town.

**[12]** SP4 also identified the deceased from photographs P7 (1-3). He identified photograph P8(5) as the payment counter.

**Ingredients Of The Charge**

**[13]** The deceased was Mohammed Khairuddin bin Mohamed Isa. The deceased who was known to SP2 and SP4 as "ustaz" was identified by them from the post-mortem photographs P7(1-3). SP12, the forensic pathologist who conducted the post-mortem examination confirmed that Mohamad Ridhauddin bin Mohamed Isa the younger brother of the deceased identified his corpse prior to the post-mortem examination. There was no dispute as to the identify of the deceased.

**[14]** His death was caused by injuries inflicted on him. The post-mortem examination conducted by SP12 and the results from such examination contained in his report, P91, together with his testimony in court clearly established this. Photographs P7(2) (15 -19), (22-23) and (25) were taken of the injuries caused to the deceased under the heading "Tanda-tanda kecederaan luaran". According to SP12, these were caused by a sharp and flat object like a parang, chopper or meat knife.

**[15]** His death resulted from the act of the four accused persons. Apart from the crucial testimony of SP2 and SP4 which was a narrative of what happened on the morning in question establishing facts on which the prosecution case was based, SP8 (Inspector Fazurah bt Mahzan, who is an audio-video analyst from the Cheras police forensic laboratory) received an application (P55) from the investigating officer SP8 to examine a piece of CD (P57A) and one unit of CPU (P60) in connection with Central report 6393/08 (P6, the first information report of the incident). SP8 made a copy from P57A and P59 was that copy. SP8's examination report, P56, was based on P59. P57A and P59 being CCTV recordings of what transpired at the cashier counter were screened in open court. All parties agreed that the contents in P57A and P59 were the same. From the sequence seen from the screening, it was evident that the deceased was attacked at the cashier counter at about the same time stated by SP2 and SP4 lending consistency and credence to what they informed the court particularly with regard to the first and fourth accused.

**[16]** Identification was the primary issue here. SP2 could not remember how many identification parades she attended which was more than once. However she said she managed to identify two that was the first accused as the one holding a parang coming towards her and the fourth accused as the one she saw at the cashier counter. SP4 also said he attended more than one identification parade and he managed to identify three persons, two at the Bercham Police Station and one at the IPD Police Station, Ipoh. He identified them as the one who wore a cap, the one who stood by the driver's door of the car and thirdly, the one who wore the dark-coloured shirt. In court as alluded earlier in these grounds he identified the first accused as the one who held a parang. He was absolutely certain the first accused was that person. SP4 identified the third accused as the one who stood by the driver's door of the red Proton Saga. He identified the fourth accused as the person who took money from the counter.

**[17]** No evidence was adduced that the first, third and fourth accuseds were picked out at an identification parade or parades held by police officers who conducted them. The holding of an identification parade is a part of the investigation process carried out by the investigating authority, ie, the police and can be used to corroborate the substantive evidence given by the witnesses in court on identification of the accused as the perpetrator of the alleged crime. It is well settled that the substantive evidence is the evidence of identification in court (see *Lim Tiong Seng & Satu Lagi lwn. PP* [2011] 5 CLJ 1 citing cases of *Budhsen v. State of UP* [1970] Cri LJ 1149, *Malkansingh v. State of Madhya Pradash* [2003] Cr LJ 3535, *Vaikuntam Chandrappa v. State of AP* [1960] Cri LJ 1681 and *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597). In *Ong Poh Cheng v. PP* [1998] 4 CLJ 1, rejection of evidence of the identification at the identification parade was in no way fatal to the dock identification of the appellant as the robber.

**[18]** Even failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration (see the Indian Supreme Court decision in *Malkansingh v. State of Madhya Pradesh* (*supra*) referred to in *Dorai Pandian Munian & Anor v. PP* [2012] 10 CLJ 22; (Court of Appeal) (Rayuan Jenayah No. J-05-38-2006 & J-05-39-2006)).

**[19]** I was well-guided by Ahmad Maarop JCA (as His Lordship then was) on the law on identification in *Dorai Pandian Munian & Anor v. PP* and *Lim Tiong Seng & Satu Lagi lwn. PP* (*supra*). Invariably the *Turnbull* guidelines (*R v. Turnbull & Others* [1976] 3 All ER 549) were noted but each case depends on its own facts and what was stated in *Turnbull* does not amount to inflexible rules with no exception whatsoever (see *Jaafar Ali v. PP* [1999] 1 CLJ 410; [1998] 4 MLJ 406, *Tan Kim Hoo v. PP & Another Appeal* [2007] 6 CLJ 557, *Erivesto Anderson & Anor v. PP* [2008] 6 CLJ 453). To hold that an identification parade must in all circumstances be conducted in order to sustain a conviction would be too stringent (see *Arumugam Muthusamy v. PP* (*supra*) at p. 75).

**[20]** Bearing in mind the above, I combed through the evidence of SP2 and SP4 which I had recorded. I quote from SP2's testimony adduced in chief:

> Lelaki yang berada di tempat cashier dan lelaki yang menuju ke arah saya, saya ada nampak wajah mereka.

A Lelaki yang menuju ke arah saya mengangkat parang terhadap saya. Dia tidak bercakap apa.

Saya boleh camkan dua orang tersebut di mahkamah pada hari ini. Orang yang saya camkan adalah orang pertama yang duduk di kandang dari bahagian kiri (merujuk kepada OKT1).

B

Saya boleh camkan OKT 1 kerana betul-betul dekat dengan saya. Ini adalah orang yang datang ke arah saya dengan memegang parang.

Orang kedua yang saya camkan adalah orang yang duduk di nombor empat dari kiri di kandang orang salah (merujuk kepada OKT4).

C

Sebelum kejadian ini, saya tidak pernah melihat OKT4 di mana-mana. Saya boleh camkan OKT4 kerana masa kejadian saya ada melihatnya. OKT4 adalah lelaki yang di bahagian cashier.

D

**[21]** In cross-examination, she disagreed with what was put to her on identification:

Saya tidak bersetuju bahawa saya tidak nampak OKT 4 di tempat cashier kerana sebaik sahaja saya nampak saya telah lari keluar dan tidak boleh camkan OKT 4. Saya hanya boleh camkan cap dan wajah OKT 4.

E

Saya ingat muka OKT 1 dan juga sweater yang dipakai olehnya. Saya bersetuju muka OKT 1 adalah muka seorang India.

F

**[22]** When re-examined, SP2 had these to say:

Tempoh masa yang singkat dan perasaan terkejut tidak menjejaskan pengecaman saya terhadap dua lelaki tersebut. Saya camkan OKT4 kerana saya ingat mukanya.

G

OKT4 yang saya camkan di mahkamah semalam adalah orang yang sama yang saya camkan ketika kawad cam.

Semasa menghadiri kawad cam, pengecaman saya terhadap OKT4 adalah berdasarkan mukanya.

H

Saya camkan OKT1 yang memakai sweater kerana saya ingat mukanya. Lelaki yang saya camkan ketika kawad cam adalah sama dengan lelaki yang memakai sweater dan menuju ke arah saya dengan parang. OKT1 yang saya camkan semalam di mahkamah adalah orang yang saya camkan ketika kawad cam.

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OKT1 dan OKT4 yang saya camkan ketika kawad cam saya tidak tahu nama-nama mereka sehingga ke hari ini.

**[23]** From my evaluation of SP2's evidence thus, she was very certain and unfaltering about her dock identification of the first and fourth accused.

**[24]** SP4's testimony pertaining to his identification in court of the three accused was anxiously considered by me. I quote from his evidence led in examination-in-chief:

Saya dapat camkan tiga orang dalam kawad cam. Saya telah mengecam 2 orang di Balai Polis Bercham dan seorang di Balai Polis IPD Ipoh. Tiada siapa yang mengajar untuk membuat pengecaman di tempat-tempat saya menghadiri kawad cam terhadap 3 orang. Tiada orang mengajar saya untuk mengecam 3 orang ini.

Saya boleh camkan tiga lelaki India yang saya camkan ketika kawad cam di Mahkamah pada hari ini.

Lelaki nombor satu dari kiri di dalam kandang orang salah adalah lelaki yang memegang parang semasa kejadian yang saya lihat (merujuk kepada OKT1). Saya pasti ini orangnya.

Lelaki di dalam kedudukan nombor 3 dari kiri di kandang orang salah adalah lelaki yang berdiri di bahagian pemandu kereta yang saya nyatakan tadi (merujuk kepada OKT3). Saya pasti ini orangnya.

Lelaki yang mengambil wang dari kaunter pada hari kejadian adalah lelaki yang kedudukan nombor 4 dari kiri di kandang orang salah (merujuk kepada OKT4). Saya pasti ini adalah orangnya

**[25]** Of significance was his absolute certainty that these were the persons he saw although in cross-examination learned counsel for the fourth accused (who also questioned SP4 on behalf of Mr Naran Singh who acted for the first accused at that stage) and third accused attempted to throw doubt on his certainty. Nonetheless in re-examination SP4 stood his ground by stating:

Ketika menghadiri kawad cam dan juga ketika melihat tertuduh di mahkamah, saya camkan bukan kerana bangsa India tetapi berdasarkan paras rupa.

Saya mula-mula sedar ada lelaki India memakai cap ketika lelaki tersebut mengambil wang dari kaunter.

A Saya mengecam lelaki di dalam kawad cam dan juga tertuduh di dalam mahkamah kerana berwajah orang India dan memakai cap.

Saya camkan tertuduh 4 di dalam mahkamah kerana dia berada di tempat kejadian.

B **[26]** All in all after having considered and compared the evidence of SP2 and SP4, I found their evidence to be consistent and unshaken in the identification of the first accused as the one seen holding a parang and the fourth accused as the one wearing a cap (according to SP2) and taking money at the counter (according to C SP4). SP2 would not have seen the fourth accused taking money at the counter because she had obviously by then run away from the scene towards the Mobil Petrol Station.

**[27]** There was no basis for me to reject SP2 and SP4's D evidence as I observed that they were credible witnesses who held fast to their identification of the first and fourth accused who were seen inside the Kedai Mesra and the third accused seen standing by the side of the red car (P39). Furthermore, SP2 and SP4 were not challenged directly in cross-examination that their identification E of the first, third and fourth accused was a mistake or was wrong. Rather it was done in a vague and indirect manner which failed to refute SP2 and SP4's resolute, positive and unwavering identification of the three accused. It was never suggested to SP2 and SP4 by defence counsel that there were circumstances which F did not allow for positive identification or had affected their identification in court such that it could be incorrect or inaccurate despite their overall positive testimony that they were able to identify the two accused persons inside the shop.

G **[28]** SP2 and SP4 remained steadfast in their testimony in re-examination that they identified the said accused because they saw and remembered their faces with reference to their evidence as earlier quoted. There was no reason for me to reject their evidence pertaining to identification of the relevant accused when seen in the light that they tended to corroborate each other where H identification of the first and fourth accused was concerned. They singled out the two accused in court separately but accurately. SP4 in addition had this to say about the condition of the place of incident:

I Di dalam Petronas keadaan cahaya ada terang ketika itu. Keadaan cahaya di bahagian pam-pam minyak juga adalah terang. Ketika saya berada di pam 10, jarak dengan lelaki India yang bergaduh dengan ustaz adalah dalam 20 kaki.

**[29]** This was not rebutted or challenged in cross-examination. So much for identification.

**[30]** Moving on to the CD P57A, it was played and screened in open court and confirmed by SP14 (the said Petronas Station operator) to be the CCTV recording done on 11 November 2008 for the time frame from about 7am till 7.30am. From my viewing of P57A, the images were not very clear as would be most CCTV recordings generally except that it could be seen clearly in one sequence of a man at the counter being attacked by another seen brandishing a weapon very much like a long parang with resultant splattering of blood. I made a point of noting this down for my own personal consumption. This showed without a doubt that the deceased, who suffered horrendous injuries based on the post-mortem report and seen from the photographs, was the one who was attacked and succumbed to his injuries.

**[31]** Although the police did not take or retrieve the CCTV recording of the external area or forecourt of the station, P57A remained authentic and gave a credible account of what exactly happened in the counter area of the shop. This corroborated what SP4 witnessed and testified that he saw a male Indian holding a parang in the direction of the deceased.

**[32]** A red Proton Iswara WEU 7168 (P39) was traced to and seized from the porch area of house No. 9 Lorong Kledang Utara 2, Taman Gamelan, Ipoh by ASP Somu (SP7) on 28 November 2008 at about 3am. The car key was given to SP7 by the owner of the house Nadarajah a/l Govindasamy who said the car belonged to his son Ganeson, the third accused. SP7 examined the car and saw a teddy bear (P31A) placed behind and above the back passenger seat on the speaker box at point marked "X" by SP7 himself in photograph P37(7). Contrary to this, SP11 (ASP Wan Norazlin) the relief investigating officer on 28 November 2008 for ASP Fakir (SP18), testified that she saw the teddy bear on the back seat of car P39 when the car was handed over to her by SP7 on 28 November 2008. She also saw P31A on the back seat on 2 December 2008 when the car was brought before SP9 for examination at the chemistry department, Perak Branch.

**[33]** The teddy bear P31A was also seen on the back passenger seat according to SP9 who found three blood smears, two on the front panel section of the car (P29A and P30A) and one on the head of P31A. SP9's report was P63. SP6 (Dr Seah Lay Hong)

who did the DNA analysis and prepared report P12 dated 26 May 2009 determined that the bloodstains indicated on the teddy bear around its head matched the DNA profile of the deceased.

**[34]** SP16, the owner of the car P39, testified that he bought the car for RM14,000 in December 2006 from a second-hand dealer. On 31 January 2007 he executed an agreement (P96) with Ganeson (identified by him as the third accused) for the purpose of letting Ganeson use the car and for Ganeson to continue paying the hire-purchase instalments in his stead with effect from the date of P96. SP16 had not used and driven the car since then.

**[35]** The only evidence which implicated the third accused was based on the testimony of SP4 who identified him as the male Indian who stood by the driver's door of the red car. It was pertinent to note that the three male Indians, two of whom SP4 identified as the first and fourth accused, were not seen by SP4 to be carrying any weapon when they entered the shop. It was apparent too that the prosecution relied on the fact that the car was in the custody and possession of the third accused and the presence of the deceased's DNA profile from one of the bloodstains found inside the car and the teddy bear (ie, P30A and P31A) to argue for the third accused's complicity in the death of the deceased in relation to s. 35 of the Penal Code. Section 35 reads:

> Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

**[36]** In *Azhar Che Wil v. PP* [2010] 8 CLJ 905, Raus Sharif FCJ for the Federal Court held that s. 35 of the Penal Code did not create a substantive offence but merely a rule of evidence open to the prosecution when several accused persons were alleged to be involved in the commission of an offence. Section 35 refers to a situation where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention and each person is liable for the act to the extent of his knowledge or intention. Thus under s. 35, the court has to consider what is the knowledge or intention of each person who joined in committing the act (on p. 917 of the case).

**[37]** I had considered the evidence available against the third accused and it was my view that such evidence as earlier highlighted was evidence after the act which could not infer the s. 35 knowledge or intention on the third accused of the criminal act of murder. It might stand to reason, ie, reasonable or likely probable that based on the facts against him, he was merely waiting for the others by the side of the car and in this respect, the benefit of the doubt ought to be given in his favour. SP4 after all did not see the third accused outside the car all the time. The parang was said to be a long one and if any one of the three who entered the shop was holding it, it was likely that SP4 would have seen it. If that had been so, it could reasonably be inferred the third accused had knowledge at the least that the three others who entered the shop had intended to use it in the commission of a crime. Where the parang came from no one was the wiser. SP4 only saw it when it was held by the first accused towards the direction of the deceased. The parang was also visibly seen from the video recording.

**[38]** In the circumstances, the third accused could not be considered or assumed as having joined in the said act as per the charge with such knowledge or intention as required under s. 35. That being so, I held that a *prima facie* case had not been proved against the third accused and he was accordingly acquitted and discharged without calling for his defence.

**[39]** As for the second accused, he was arrested by SP7 on 3 December 2008 at about 10.30pm at Bukit Mertajam. On 6 December 2008 at about 11.15am, SP7 together with the second accused and commando 69 divers went to house no. 119, Kg. Razak, Jalan Kuala Kangsar, Ipoh. The divers recovered a 21 inches parang (P53A) from a mine near the house. The said house address was indicated in the identity card of the second accused as his address.

**[40]** There was nothing else to indisputably conclude that P53A was the murder weapon. On my evaluation, there was no evidence to link or connect and implicate the second accused to the offence as charged against him. He was not identified by SP2 and SP4, the two material witnesses in this case, as the third male Indian who entered the shop. For these reasons, the second accused was also acquitted and discharged at the close of the prosecution case for want of *prima facie* evidence against him.

A **Intention To Cause Bodily Injury Which Is Sufficient In The Ordinary Course Of Nature To Cause Death**

**[41]** The prosecution relied on s. 300(c) of the Penal Code. The cause of death stated in the post-mortem report P91 was
B "pendarahan berlebihan akibat luka-luka tetakan".

**[42]** In *Virsa Singh v. State of Punjab* AIR 1958 SC 465, the Indian Supreme Court interpreted a similar s. 300(c) of the Indian Penal Code by laying down the law firstly that the prosecution must establish, quite objectively, that a bodily injury was present,
C secondly that the nature of the injury must be proved based on purely objective investigations and thirdly it must be proved that there was an intention to inflict that particular bodily injury, ie, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements were proved to
D be present, it must fourthly and finally be proved that the injury of the type described and made up of the three earlier elements was sufficient to cause death in the ordinary course of nature. This part was purely objective and inferential and has nothing to do with the intention of the offender.
E

**[43]** In construing s. 300(c) of the Penal Code, the courts should apply a subjective test in order to determine whether the injury was intentionally inflicted and whether the injury was of the type that would be ordinarily fatal was usually dependent on the
F medical evidence (see *T Paramasparan Thanigajalam v. PP* [2012] 4 CLJ 309).

**[44]** The injuries and the nature of such injuries were set out in detail in P91. The forensic pathologist SP12 testified that the
G numerous stab wounds sustained by the deceased as described by him were cumulatively fatal in nature that would ordinarily be sufficient to cause death although he emphasised (when cross-examined) that the injuries to his vital structure was to his head to the extent that the brain was struck (see photographs P7(15)
H and (16)). SP12 further concluded that the probability of survival was slim on account of the injuries caused to the deceased.

**[45]** Reference was made to P91 where SP12 had stated:

> Luka-luka tetakan yang dialaminya adalah berpunca dari tetakan
I suatu objek yang tajam dan pipih, yang dilakukan secara bertubi-tubi dengan menggunakan kudrat yang kuat. Satu objek yang

sama sudah cukup untuk menyebabkan kesemua luka-luka tersebut. Luka-luka pada kedua-dua tangan dan lengan kanan adalah bersesuaian dengan tindakan cubaan mempertahankan diri.

**[46]** In addition, the brandishing of a long parang was clearly seen from the video recording in conjunction with what SP2 and SP4 had said about having seen a parang held by the first accused. I therefore found that the injuries were undoubtedly and intentionally inflicted against the defenceless deceased in the circumstances while not ignoring SP4's testimony that he nevertheless saw the three accused holding a parang when they were leaving the shop. Based on the evidence before me, the inference was irresistible for the application of s. 35 of the Penal Code against the first and fourth accused.

**[47]** After the close of the prosecution case, I concluded that a *prima facie* case was made out against these two accused who were called to enter their defence.

## Defence Case

**[48]** The first and fourth accused elected to give evidence on oath. The fourth accused testified first.

**[49]** This was the version of the fourth accused. It was sometime in early November 2008 that he returned to Ipoh from his place of work in Skudai, Johore. He met up with his friends (the other three accused) for dinner and drinks. They went in Ganeson's car. The next morning at about 6.40am they left the restaurant to go home and on the way proceeding towards Wing Onn Garden, Ganeson stopped at the Petronas Petrol Station (which was near the house of Thayalan, the second accused) to re-fuel.

**[50]** The fourth accused paid for the petrol at the counter without going inside the station shop. After re-fueling and when Ganeson wanted to drive off, Nanda Kumar (the first accused) wanted to buy cigarettes. Ganeson stopped by the side of the glass door of the shop for him to do so. About five minutes later, Nanda Kumar came out from the shop and informed them (who were waiting in the car) that the cashier said the money used by Nanda Kumar to buy cigarettes was forged money and he (the cashier) wanted to lodge a report besides uttering the word "pukimak" to him.

**[51]** The fourth accused alighted from the car and went into the shop together with Nanda Kumar. Nanda Kumar asked for the return of his money while also asking the cashier why he uttered the said word about his mother. The cashier (referring to the deceased) replied by saying "India, you orang paria, you orang pagi-pagi datang bagi masalah". Then arose an argument between the fourth accused and the cashier.

**[52]** According to the fourth accused, the cashier went on to say loudly "pukimak you orang mahu balik atau tak mahu". The fourth accused retorted back by using foul language. It was then that the cashier suddenly took out a parang. On seeing this, the fourth accused became frightened, jumped on to the cashier and hugged ("memeluk") him to prevent him from doing anything. A struggle ensued and Nanda Kumar came to help him. Soon after, Thayalan arrived to help them. The cashier fell and the fourth accused fell on top of the cashier.

**[53]** It transpired that the struggle lasted for less than 1/2 an hour and he finally realised that Nanda Kumar and Thayalan had also fallen on top of him during the struggle. The fourth accused got up and saw bloodstains on his clothes and the body of the cashier. He heard the cashier screaming "tolong, tolong". The fourth accused panicked and subsequently he, Nanda Kumar, Thayalan and Ganeson left the shop and the station in their car. It was only then that he realised that Ganeson was also inside the shop.

**[54]** The fourth accused said they did not bring any weapon with them when they arrived at the Petronas Station. He described that the cashier held the parang high in his right hand. It was then that he jumped onto the cashier. He did not at any time during the struggle take the parang from the accused and injured him.

**[55]** The fourth accused testified that the cashier looked aggressive and angry when holding the parang. He fell onto the cashier by hugging him. He was slightly injured in the chin as a result of the struggle. The fourth accused went on to further say that he did not intend to kill or cause grievous hurt to the cashier. He agreed that if the cashier had not used those derogatory words, the incident would not have happened. He was angry when he heard those words.

**[56]** Nanda Kumar, the first accused, more or less gave the same testimony. He said the cashier used these words "India paria pukimak pagi-pagi lu orang mau tipu ke" when he handed him a RM100 note to buy cigarettes. The cashier said "India pukimak kamu belum balik ke?" when he asked for his RM100 to be returned. He added that the struggle between the deceased and the fourth accused took place inside the counter. When he saw the fourth accused did not succeed in felling the deceased, he went in to help. He also said the cashier was stronger than him and they fell the cashier ("menjatuhkan juruwang") with difficulty. He was afraid when the cashier took out the parang.

**[57]** The first accused agreed when cross-examined that he went to help the fourth accused to seize the parang from the deceased but they failed to do so. He further maintained that the deceased was still holding the parang when he left the shop.

**[58]** In his submissions, learned counsel for the two accused invited me to draw a reasonable doubt from the defence evidence that there was provocation and sudden fight which was not premeditated and resulted in the death of the deceased. In other words, they relied on the defence of exception 1 and 4 of s. 300 of the Penal Code. In exception 1, culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident. By exception 4, culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner. Learned counsel in support thereof referred to and cited these cases: *Lorensus Tukan v. PP* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162; *PP lwn. Mohan Dass Ganesan* [2007] 8 CLJ 23; [2007] 4 MLJ 87, *Atma Singh Kahan Singh v. The State* AIR 1955 Punjab 191, *Hainie Hamid v. PP* [2003] 2 CLJ 137; [2003] 2 MLJ 403, *Ahmad Raduan Awang Bol v. PP* [2003] 1 CLJ 366, *PP v. Low Kian Boon & Ors* [2006] 3 CLJ 649 and *PP v. Megat Shahrizat Megat Shahrur* [2011] 5 CLJ 608.

**[59]** For the two accused to succeed in raising their defence of grave and sudden provocation, they must show to the court that the provocation which they received must be so grave and sudden that it had deprived them of the power of self-control. They must also show that the provocation would also deprive a hypothetical

A reasonable man of his power of self-control. Whether the provocation was said to be so grave and sudden as to deprive a reasonable man of his power of self-control was a question of fact which must be viewed and assessed objectively (see *Lorensus Tukan v. PP* (*supra*) and *T Paramasparan Thanigajalam v. PP* (*supra*)).

B

**[60]** The provocation in the instant case was the derogatory or swear words allegedly uttered by the deceased to them. The fourth accused merely said he was angry when he heard the words "India you orang paria, you orang pagi-pagi datang bawa masalah" and "pukimak you orang mahu balik ke tak mahu". Nothing was forthcoming from him that these were provoking words that were so grave and sudden as to deprive him of his self-control. In the case of the first accused, he was evidently in self-control because when the words "India paria pukimak pagi-pagi lu orang mau tipu ke" were purportedly uttered to him, he went outside to the car to complain to the fourth accused. The story-line of the defence simply did not smack of any viable defence of grave and sudden provocation.

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**[61]** Secondly, was the defence of sudden fight made out based on the evidence of the two accused to reduce the offence to one of culpable homicide? The plea of sudden fight was rejected by the Privy Council in *Mohamed Kunjo v. PP* [1977] 1 LNS 74 where the facts showed that the accused had disengaged himself from the fight in order to secure a weapon, an exhaust pipe, to attack the defenceless deceased. Lord Scarman held that the accused had taken undue advantage which he defined to mean "unfair advantage" or had acted in a cruel or unusual manner.

F

G

**[62]** In *T Paramasparan Thanigajalam v. PP* (*supra*), Abdul Malik Ishak JCA for the Court of Appeal rejected the plea of sudden fight because the aggressor was the appellant/accused and not the deceased. The nature of the weapon used by the appellant was also indicative that the appellant had taken undue advantage and when the appellant repeatedly assaulted the deceased using the rice cooker wire and a broom stick, it was held he had acted in a cruel or unusual manner (see also *PP v. Awang Raduan Awang Bol* [2005] 1 CLJ 649).

H

I

**[63]** The defence story by both accused persons was of the deceased lying below them during the struggle. They together with another (Thayalan) were atop of each other on the body of the deceased who was felled to the ground by them. This was a case of three against one with three of them inclusive of the first and

fourth accused plainly having undue or unfair advantage over the deceased. The excuse that the deceased was stronger or taller than the accused persons had no merit at all when it was three persons against one deceased person. In fact the three of them could have easily overpowered the deceased.

**[64]** Furthermore, any suggestion that the two accused were frightened when the deceased suddenly took out a parang was too feeble to accept as they could have immediately fled the place as would be the natural response or reflex action of any reasonable man put in a similar situation. The deceased was allegedly holding a parang inside the counter while they were standing outside the counter which was away from the deceased. I hence held the defence of sudden fight to be totally baseless.

**[65]** It was noted too by me from the video recording that there was no scene or recording of any scene that showed the three of them falling on top of the deceased as per the defence version. The first and fourth accused not only failed to seize the parang from the deceased but when they left the shop it was said by them that the deceased was still holding the parang. However there was no evidence from any one of the prosecution witnesses particularly the investigating officer that a parang, a blood-drenched one at that considering the injuries to the deceased, was found at the crime scene.

**[66]** Finally the two accused flatly denied the prosecution version of the case which was painstakingly put to them by Learned Deputy. Ultimately, there were no circumstances that could cast any reasonable doubt on the prosecution case which had been evaluated on a maximum basis before their defence was called (*PP v. Ku Lip See* [1980] 1 LNS 166; [1981] 1 MLJ 258 and *DA Duncan v. PP* [1980] 1 LNS 222; [1980] 2 MLJ 195).

## Conclusion

**[67]** After having considered the case for the defence and weighed and assessed the evidence that had been adduced in totality, I found that the first and fourth accused had failed to cast any reasonable doubt on the prosecution case. The prosecution had therefore proved its case against them beyond reasonable doubt. They were found guilty and convicted of the offence as charged. They were accordingly sentenced to the mandatory death sentence.